79-1928

No.

Supreme Court, U. S.
FILED
JUN 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

TULLY CORPORATION OF VIRGINIA,

Petitioner,

vs.

PAMELA WINTER, a minor, by PHYLLIS WINTER, her mother and next friend,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Tully Corporation of Virginia prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming a judgment for $250,000.00 entered on a jury verdict in favor of respondent.

REFERENCE TO OPINION DELIVERED BELOW

The opinion issued below was not published or reported. A copy thereof is contained herein in the Appendix hereto.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on March 12, 1980. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of that date.

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254 which states in relevant part:

> § 1254. Courts of appeals; certiorari; appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the standard for determining if cotton fabric is unreasonably dangerous is governed by the decision of the United States Court of Appeals for the Seventh Circuit in this case, or by the conflicting decision of the United States Court of Appeals for the Fifth Circuit in *Simien v. S. S. Kresge Co.*, 556 F.2d 551 (5th Cir. 1978).

STATEMENT OF THE CASE

This matter was brought in the Federal District Court for the Northern District of Illinois, Eastern Division, pursuant to the jurisdictional provision of 28 U.S.C. § 1332(a)(1).

The Accident

Plaintiff, who was seven years old, was wearing a tubular knit sweat shirt composed of 94% cotton and 6% acrylic. She removed a match from a book of matches, lit the match and held one end of the burning match between her fingers in a vertical position for a couple of seconds until it burned down. When it burned down to her fingers, she dropped it straight down into a fold of the sweat shirt.

Either five seconds or a couple of seconds after she dropped the match, she smelled smoke, looked down and saw the match burning a little bit. She saw flames and ran into the bathroom, and then into the kitchen. When her grandmother saw her enter the kitchen, there was a one or two inch flame concentrated in one spot at the middle of the waistband. The grandmother tried to pat the flame out with her hands and the flames got bigger. She then picked Pamela up, laid her face down on the sink and splashed water on her. When she put Pamela back on the floor, the fire was not out, so she repeated the splashing maneuver.

Expert witnesses analyzed and tested the sweat shirt. The fabric, when contacted by a burning match with a temperature of 1,030 degrees, ignited in two to five seconds at the time of the occurrence and in more than

one second in laboratory tests. In one test, the fabric took more than 50 seconds to burn five inches and, in a stricter NFPA-702 test, took 21.3 seconds to burn five inches. It took 75 seconds to char to the neckband and two and one-half minutes to burn to the same extent as did plaintiff's sweat shirt.

The expert witnesses further testified as to the possibility of commercially applying flame retardant chemicals to various fabrics, and rendered opinions as to whether the shirt was unreasonably dangerous.

The shirt fabric burned more slowly than do the great majority of fabrics in common use. Its burn rate was comparable to that of other sweat shirts.

Events Of Trial

The jury was charged in part as follows:

> The plaintiff claims she was injured and sustained damage as a result of the use of a cotton sweat shirt, and that *there existed in the sweat shirt at the time it left the control of the defendant a condition which made the sweat shirt unreasonably dangerous in the following respect: The sweat shirt was manufactured and sold without flame retardant materials so as to protect the user from rapid ignition and burning.*
>
> The plaintiff claims that the foregoing was a proximate cause of her injury.
>
> The defendant denies that any claimed condition of the sweat shirt made the sweat shirt unreasonably dangerous and denies that any claimed condition of the sweat shirt was a proximate cause of plaintiff's injuries. (Emphasis added.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A writ of certiorari should be granted in this case in order to resolve the conflict that now exists between the Seventh Circuit and the Fifth Circuit with respect to the need to apply flame retardant chemicals to clothing. The resolution of such a conflict is obviously important to the entire garment industry. That industry is now subject to conflicting rulings as to whether clothing which possesses otherwise normal and usual characteristics is unreasonably dangerous if it is not chemically flame retarded.

If the order in the instant case is allowed to stand, ordinary fabric used in one part of the country will be required to have flame retardant applied to it, whereas fabric used in other parts of the country will not face compliance with such an expensive and possibly infeasible standard.

A conflict exists because the Seventh Circuit in the instant case held that the untreated fabric could be found to be unreasonably dangerous, whereas the Fifth Circuit in *Simien v. S. S. Kresge Co.*, 566 F.2d 551 (5th Cir. 1978) held that untreated apparel with similar burning characteristics was not inherently dangerous.

In *Simien v. S. S. Kresge Co.*, 566 F.2d 551, 554, 560 (5th Cir. 1978), a jacket caught fire when plaintiff used gasoline on a small fire. When tested, the fabric in one test took 4.5 seconds to ignite and 20.7 seconds to burn six inches, and in another test took 2.71 seconds to ignite and 39.8 seconds to burn six inches. The Fifth Circuit held as a matter of law that the fabric was not inherently dangerous.

In the instant case, the only issue submitted to the jury was whether the sweat shirt was unreasonably dangerous in that it lacked a flame retardant so as to prevent rapid ignition and burning. In tests, the shirt was ignited by a burning match with a temperature of 1,030 degrees. In one test, the fabric took more than 50 seconds to burn five inches. In the stricter NFPA-702 test, the fabric took 21.3 seconds to burn five inches. The fabric took two to five seconds to ignite at the time of the occurrence and took more than one second to ignite in laboratory testing. The test shirt took two and one-half minutes to burn to the same extent as did plaintiff's shirt.

The only issue in the instant case was whether the manufacturer had a duty to apply a chemical flame retardant to the fabric. The Seventh Circuit affirmed the decision of the trial court which allowed the case to go to the jury on the premise that clothing which is otherwise normal and safe is dangerous if it is not chemically flame retarded. If this case had arisen in the Fifth Circuit, it would not have gone to the jury because that Circuit has held that fabric possessing the burning characteristics of the sweat shirt is not unreasonably dangerous. If fabric is not unreasonably dangerous, the manufacturer has no duty to increase its safety by applying a chemical flame retardant.

There was nothing unusual about the burning characteristics of the sweat shirt, and in fact it burned more slowly than do the great majority of fabrics in common use. Thus the instant case is not comparable to or controlled by those cases where clothing burst completely into flames or burned with unusual intensity as occurred in *LaGorga v. Kroger Company*, 275 F. Supp. 373 (W.D. Penn. 1967), *Knab v. Alden's Irving Park, Inc.*, 49 Ill. App. 2d 371, 199 N.E.2d 815 (1964) and *Ray-*

mond v. Riegel Textile Corporation, 484 F.2d 1025 (1st Cir. 1973). A manufacturer is not liable for all harm resulting from use of his product, but only for harm caused by an unreasonably dangerous condition. *Beetler v. Sales Affiliates, Inc.*, 431 F.2d 651, 653 (7th Cir. 1970). A manufacturer is not required to make common articles accident-proof. *Fanning v. LeMay*, 38 Ill. 2d 209, 212, 230 N.E.2d 182, 184, 195 (1967). Having manufactured a safe product, petitioner was under no duty to make the product accident-proof. Therefore the contrary decision of the Seventh Circuit herein should not be allowed to stand.

CONCLUSION

Petitioner Tully Corporation of Virginia respectfully requests that a Writ of Ceritorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment and opinion of the Court herein. Review by this Court is warranted in order to resolve the conflict which now exists between Circuits with respect to whether an ordinary article of apparel is dangerous if it is not chemically flame retarded.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Argued November 30, 1979
March 12, 1980

Before
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

PAMELA WINTER, a minor by Phyllis Winter, her mother and next friend,

Plaintiff-Appellee,

No. 79-1540 *vs.*

TULLY CORPORATION OF VIRGINIA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-859—**Prentice H. Marshall**, *Judge.*

ORDER

[Unpublished Order Not To Be Cited
Per Circuit Rule 35]

Plaintiff through her mother and next friend brought a strict tort liability action to recover damages caused to plaintiff when the sweat shirt she was wearing which

was manufactured by the defendant ignited and burned. This appeal is taken from a judgment entered on a jury verdict in favor of plaintiff in the amount of $250,000. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

On April 19, 1974 plaintiff, age 7, was wearing a sweat shirt which her mother had purchased for her less than six months earlier at Sears.[1] Alone in the living-room of her home plaintiff lit a match from a book of matches which had been on a living room table. When the match burned down to her fingers she dropped it into a fold in the front of the sweat shirt. After an apparent attempt to put the flames out for herself in the bathroom, she ran to her grandmother in the kitchen who eventually succeeded in extinguishing the fire by twice placing plaintiff in the kitchen sink and splashing water on her. Plaintiff suffered severe burns and was required to undergo several skin grafts which nonetheless have left her with a permanently disfigured chest area.

The trial court admitted the testimony of the plaintiff, her doctors and her grandmother on the events surrounding her injuries.[2] Under plaintiff's theory of her case it was necessary for her to prove that the sweat shirt was sold in a defective condition, namely, that it was excessively flammable, and therefore presented an unreasonable risk of injury to the wearer which, in turn, proximately caused the injuries incurred. To this end, plaintiff presented the testimony of two expert witnesses who gave opinions regarding the quality of the sweat shirt and the commercial feasibility of applying a flame retardant at the time of manufacture.

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[1] The shirt was a tubular knit garment made of cotton (94%) and acrylic (6%) fiber. It is undisputed that plaintiff's sweat shirt was manufactured in the second half of 1973.

[2] No contention is made on appeal that the damages awarded to plaintiff for her physical injury and emotional trauma are excessive.

Robert F. Johnson, a professor in the Department of Textiles and Clothing at the University of Minnesota,[3] testified that on the basis of tests which he had performed he was able to conclude that the sweat shirt was unreasonably dangerous. Tests which Johnson considered to be particularly relevant revealed that: the sweat shirt produced no flame or smoke when it burned which would warn a wearer of danger, the flames could be extinguished only with difficulty, and an intense heat was produced when the fabric burned.[4] Johnson conceded that the fabric satisfied the flammability standard established in the Flammable Fabrics Act of 1953,[5] but was of the opinion that this was not a valid predictor of a fire hazard.[6] Finally, Johnson testified that there were four fire retardants available in 1973, the approximate date of manufacture plaintiff's shirt, which could have been applied to the sweat shirt at a costs of 20¢ to 35¢ per yard without impairing the feel of the shirt and without washing out for a least 50 washings. Johnson treated a sweat shirt with one of these retardants,

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[3] Appellee does not contest the qualifications of this expert witness.

[4] Johnson placed the sweat shirt on a manikin similar in size to plaintiff, dropped a lighted match into a fold of the shirt and computed the rate of burn of the fabric. It took two and one-half minutes for the shirt to burn to the same extent as did plaintiff's sweat shirt.

[5] The Flammable Fabrics Act of 1953 (15 U.S.C. §§ 1191-1200) established a flammability standard, known as CS 191-53, which any fabric or wearing apparel shipped in interstate commerce must satisfy. CS 191-53 involves placing a small fabric sample in a test cabinet and holding it at a 45 degree angle. The fabric is then exposed to a small flame for one second. If the fabric does not ignite within one second, it passes the test. If ignition occurs there are additional procedures used to measure the rate of burn of the fabric.

[6] Johnson noted that holding the fabric at a 45 degree angle does not properly simulate the more usual vertical position of burning clothing and an angle at which clothing will burn more quickly. Second, the test chamber is draft-free which does not take into account air currents, for example, those caused by a victim running or beating the flames with his hands.

Pyrovatex, and performed tests identical to those which he performed on the untreated shirt. The specifications of these test results are not part of the record but Johnson did conclude that the safety of the sweat shirt had "improved."

Plaintiff's second expert witness, James Sconce,[7] testified that THPC was a commercially available flame retardant which could be applied to a sweat shirt for 30¢ per yard and would not wash out at all.

The defense introduced two expert witnesses to testify on the commercial feasibility of a flame retardant and the danger of the sweat shirt's design. Robert Le Blanc, a chemist specializing in flame retardant chemicals, stated that the sweat shirt had exceeded the federal minimum standard provided in CS 191-53 (note 5 *supra*) and was not unreasonably dangerous. Further he noted that two commercially available flame retardants were not suitable for application to a sweat shirt. Pyrovatex is never used on tubular knits such as a sweat shirt because it does not apply evenly, causes strength loss, and it washes out if non-phosphate detergents or ordinary bleach are used. THPC is not used on knits for those same reasons as well as the fact that it forms a toxic chemical as a by-product during its application.

Defendant's second expert witness, George Buck, concurred that the sweat shirt in issue was not unreasonably dangerous. He based his opinion on the fact that the sweat shirt passed not only the CS 191-53 test which he had performed but also the NFPA-702 test, a stricter test for wearing apparel designed by the

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[7] Defendant produced Rex Schad to impeach the testimony of Sconce. Both Sconce and Schad had been employed by the Hooker Chemical Corporation until Sconce had retired. Sconce testified that the Lymus Finishing Company had applied THPC, a fire retardant, to fabric used by the Navy. Schad, on the other hand, was of the opinion that THPC was not commercially feasible at all in 1973 and at present it was unsuitable for application to a nonwoven fabric the jury obviously resolved the conflict in Sconce's favor.

National Fire Protection Association.[8] Buck also stated that retardants were not suitable for application to knit fabrics.

The jury returned a verdict for $250,000 in favor of the plaintiff. The defendant's motions for new trial and judgment notwithstanding the verdict were denied by the district judge who stated that the credibility of witnesses and the resolution of conflicts in expert testimony were properly subjects for the jury's decision. The issues presented on appeal concern (1) the sufficiency of the evidentiary basis for the jury's findings, based on the instructions that the sweat shirt was unreasonably dangerous, that there was a causal relationship between the composition of the garment and the injuries suffered by plaintiff and that the accident was reasonably foreseeable; and (2) the propriety of the district court's denial of the motions for new trial and judgment notwithstanding the verdict. It is conceded that the case is to be decided under Illinois law. *Gudgel v. Southern Shippers, Inc.*, 387 F.2d 723 (7th Cir. 1967). Illinois adopted the Restatement of Torts view of strict liability in *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182, 187 (1965); Restatement (Second) of Torts § 402A (1965).

Defendant's main argument on the issue of the danger of the sweat shirt revolves around the significance of compliance with CS 191-53 (note 5 *supra*). Defendant does not ask this Court to hold that compliance with the federal standard precludes as a matter of law a finding of excessive flammability or improper design. And, in fact, one case which defendant asserts constitutes "controlling support" for its position holds only that compliance with CS 191-51 is substantial but not conclusive evidence that the fabric is not defective.[9] The First Cir-

[8] Although defendant's witness LeBlanc criticized as unreliable tests using manikins, such as those employed by plaintiff's witness Johnson, Buck stated that manikin tests were often useful.

[9] *Simien v. S. S. Kresge Co.*, 566 F.2d 551, 556-560 (5th Cir. 1978). In that case, because plaintiff did not proffer any evidence as to the degree of heat produced by the fire, the dif-

(Footnote continued on following page)

cuit has reached a similar result. *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025 (1973). Rather, defendant urges that a comparison of the burning characteristics of the sweat shirt in issue with various test fabrics and with the fabrics discussed in other similar cases precludes finding the sweat shirt unreasonably dangerous. With respect to the causal relationship between the composition of the fabric and the injury, defendant contends that plaintiff failed to show that she would not have been burned had a flame retardant been used. Because a flame retardant would have washed out after approximately ten washings no practical results would have been accomplished according to defendant.[10]

From the evidence presented at trial the jury could have found that the sweat shirt ignited easily, burned rapidly, and was difficult to extinguish. There was evidence introduced regarding the age of the child for whom the sweat shirt was designed and the amount of time required for a child to remove a similarly constructed shirt. We think that it is no answer to assert that the burning characteristics of the sweat shirt were no different from those possessed by the clothing worn by those present in the courtroom. It is the jury's role to weigh conflicting evidence regarding the significance of the test results on burning rates and to determine the credibility of witnesses. *Bouillon v. Harry Gill Co.*, 15 Ill. App. 3d 45, 301 N.E.2d 627 (5th Dist. 1973). Plaintiff introduced disputed evidence that a flame retardant

[9] *continued*
ficulty in removing the garment, the availability and effectiveness of flame retardants, and in the face of uncontroverted evidence that the fabric was ignited only with difficulty, the court ruled that the defendant that complied with the federal standards was entitled to a judgment as a matter of law. This holding is also dependent upon a feature of Texas law which would not permit the trial court to admit into evidence an expert witness's observation that the fabric was unreasonably safe without more evidence constituting the basis of the opinion. *Id.* at 558.

[10] For a recent helpful discussion of this whole area, see S. Weinstein, Flammable Fabrics. 84 Case & Comment 3 (Nov.-Dec. 1979).

could be applied to the sweat shirt for a cost of approximately thirty cents. Similarly, there was no reason to take the resolution of the issue of proximate cause from the jury. *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 84, 117 N.E.2d 74 (1974).

In addressing the issue of the foreseeability of the accident, defendant suggests that while a person might contemplate a match coming into momentary contact with a sweat shirt, it is not foreseeable that the match would be allowed to drop on the fabric and lay there until the shirt caught on fire. Questions of foreseeability are also ordinarily matters for the jury. *Dunham v. Vaughn & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (1972). Defendant's own expert witness testified that matches are among the top four causes of burns and that children are more than three times as likely to be burned than adults. Because it is objectively reasonable to expect that a child might play with matches while wearing a sweat shirt, we may not disturb the jury verdict. *Winnett v. Winnett*, 57 Ill. 2d 7, 310 N.E.2d 1, 5 (1974); *Knab v. Alden's Irving Park, Inc.*, 49 Ill. App. 2d 371, 380, 199 N.E.2d 815, 821 (1st Dist. 1964).

Because there is no basis for disturbing a jury verdict based on important issues of fact regarding which reasonable persons could differ, there is no basis for holding that a denial of a judgment notwithstanding the verdict was an abuse of discretion. *See LaGorga v. Kroger Co.*, 275 F. Supp. 373, 379 (W.D. Pa. 1967).

For these reasons the judgment of the district court is affirmed.